

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

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JUAN HERNANDEZ, DEQUAN  
KIRKWOOD, MANUEL TREVINO and  
KENT WHEATFALL, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS,

Defendant.

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) Case No. 16-CV-3577

) (Class Action)

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) Jury Trial Demand  
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**PLAINTIFFS' RESPONSE SUGGESTING MOOTNESS OF DEFENDANT'S MOTION  
TO DISMISS**

By operation of law, the filing of an amended complaint renders a prior complaint void and moots any motion to dismiss the prior complaint. However, in an abundance of caution, Juan Hernandez, DeQuan Kirkwood, Manuel Trevino, and Kent Wheatfall, on behalf of themselves and all other similarly situated (collectively "Plaintiffs") respectfully request that this Court deny as moot the Defendant's Motion to Dismiss.

The filing of an amended complaint renders all earlier filed complaints void. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading."). "If an amended complaint does not incorporate the earlier pleading, a court may deny as moot a motion to dismiss that was filed before the operative amended complaint." *Probado Techs. Corp. v. Smartnet, Inc.*, 2010 WL 918573, at \*1 (S.D. Tex. Mar. 12, 2010) ("Because Defendant's Motion to Dismiss was filed before the operative First Amended Complaint and only addresses the non-operative Original

Complaint, this Court DENIES AS MOOT Defendant's 12(b)(6) Motion to Dismiss without prejudice.”).

Currently pending before the Court is Plaintiffs’ Amended Complaint as-of-right under Fed. R. Civ. P. 15(a)(1). (Dkt. 19.) Defendant filed its Motion to Dismiss Plaintiffs’ original Complaint on February 9, 2017. (Dkt. 15.) The filing of Plaintiffs’ Amended Complaint moots the Defendant’s pending Motion to Dismiss. The pending Motion to Dismiss, therefore, should be denied without prejudice to any arguments that the Defendant may raise with respect to Plaintiffs’ Amended Complaint, and Plaintiffs reserve their right to respond to any arguments that the Defendant may raise with respect to Plaintiffs’ Amended Complaint.

Defendant’s Motion to Dismiss is rendered moot in light of Plaintiffs’ Amended Complaint, which does not incorporate the original Complaint. Accordingly, Plaintiffs respectfully request that the Court deny Defendant’s Motion to Dismiss as moot, without prejudice to its renewal with respect to Plaintiffs’ Amended Complaint.

Dated: March 2, 2017

Respectfully submitted,

/s/ Rebecca Bernhardt

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of March 2017, I caused a copy of the foregoing document to be served on all counsel by the Electronic Case Filing System for the United States District Court for the Southern District of Texas.

/s/ Charles Gerstein

Charles Gerstein